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No. 80-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC.,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.

Appellant,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES I through X, inclusive,

Appellees.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae

in support of appellants. Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

PLF is a nonpro t, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

This action involves the validity of San Diego Ordinance No. 10795 (New Series) (hereinafter Ordinance) which purports to ban all off-site outdoor advertising from the City of San Diego. In doing so, the Ordinance destroys a multimillion dollar business which has flourished in the city since its inception, and deprives the inhabitants of San Diego of a unique and accepted means of communicating with each other. (It is beyond dispute that the medium is utilized for other than commercial purposes.)

Amicus is especially aggrieved as a public interest organization due to the nature of the communication medium outlawed. The Ordinance precludes PLF's members, supporters, and contributors from using the billboard medium as a means both of *receiving* and *conveying* important information. In essence, the Ordinance restricts access by the public to the marketplace of ideas. The government "may not, consistently with the spirit of the First Amendment, contract the scope of available knowledge." *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965).

The Ordinance does provide certain limited exceptions. For example, certain types of political messages are permitted by the use of *temporary* political campaign signs which are maintained for not longer than 90 days *and* are removed within ten days after the election to which they pertain. But this exception is so narrow that political expression outside the

context of a current campaign is banned. Expression against involvement in the United Nations, against rising taxes, or a protest related to the assassination of the Israeli delegation to the Munich Olympic Games would be totally prohibited. *See* Juris. Statement, App. I. In fact, virtually all communication would be banned from billboards in San Diego. Those few exemptions from the Ordinance allowing certain messages to be conveyed bear no rational relation to the goals of the city which are stated in the Ordinance—traffic safety and aesthetics.

The courts have historically allowed the widest latitude for discussion and the narrowest range for its restriction. *Thomas v. Collins,* 323 U.S. 516, 530 (1945). PLF is concerned that the Ordinance, which totally prohibits many messages from being displayed while permitting limited exceptions, bears no reasonable relationship to the stated goals of the city, and is overly broad and not narrowly drawn to serve the stated goals of the city. Therefore, the Ordinance violates the constitutional guarantees of free speech, equal protection, and due process.

SUMMARY OF ARGUMENT

San Diego Ordinance No. 10795 violates the guarantee of freedom of speech contained in the First Amendment to the United States Constitution, because it restricts both the right to disseminate information and the right to acquire information. The restriction imposed by the Ordinance is unconstitutional because it is content-based, prohibiting certain messages from being conveyed on billboards while allowing others to be so conveyed.

Even if it could be said that the Ordinance represents a time, place, or manner restriction, the Ordinance still violates the First Amendment. It unduly burdens constitutional rights by totally precluding opportunities for the communication of thought, in the pursuit of the goals of traffic safety and aesthetics. Additionally, the Ordinance bears no reasonable relationship to the achievement of its stated goals and is overly broad in scope and not narrowly drawn to serve the goals of the city.

By totally shutting down the use of a traditional public forum for the expression of ideas, the ban unduly burdens certain segments of society. Specifically, the ban works hardest against those who cannot afford the more expensive print and broadcast media, those who wish a limited, yet effective circulation of their message, those whose message requires the visual impact that only a billboard can provide, and those whose message can only be conveyed effectively through billboards.

The Ordinance also violates the constitutional guarantee of equal protection by permitting certain messages to be conveyed on billboards while prohibiting others from being displayed. Content-based restrictions on the exercise of free speech violate the Equal Protection Clause.

Lastly, the Ordinance violates the constitutional guarantee of due process because, under the guise of the police power, it seeks to achieve certain goals by the use of means which are arbitrary and discriminatory, and which bear no reasonable relation to the health, safety, welfare, or morals of the community.

ARGUMENT

I

THE SAN DIEGO ORDINANCE VIOLATES THE CONSTITUTIONAL GUARANTEE OF FREE SPEECH

A. Regulation of Speech Based on Content Is Unconstitutional

The First Amendment to the United States Constitution guarantees in part that "Congress shall make no law . . . abridging the freedom of speech . . . ." This is the most majestic guarantee contained in the Constitution. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-1 (1978). The dissemination of opinions on matters of public interest is an "unalienable right," and is the "matrix, the indispensible condition, of nearly every other form of freedom." *Curtis Publishing Co. v. Butts,* 388 U.S.

130, 145, 149 (1967). This fundamental right has been made applicable to the states by the Fourteenth Amendment.[1] *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 100 S. Ct. 2343, 2349 (1980).

The purposes of the First Amendment are stimulation of free discussion and interchange of ideas, *Buckley v. Valeo,* 424 U.S. 1, 14 (1976), protection of the "marketplace of ideas" from governmental infringement, and promotion of intelligent self-government in a democratic system, L. TRIBE, *supra,* in order that "such freedom will ultimately produce a more capable citizenry and a more perfect polity." *Cohen v. California,* 403 U.S. 15, 24 (1971). *See Consolidated Edison Co. v. Public Service Commission,* 100 S. Ct. 2326, 2331 (1980). The "freedom to think as you will and to speak as you think" is "indispensible to the discovery and spread of political truth." *Whitney v. California,* 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The protections of the First Amendment include the right of the recipient to acquire information as well as the right of the speaker to disseminate information. *Pell v. Procunier,* 417 U.S. 817, 832 (1974); *Stanley v. Georgia,* 394 U.S. 557, 564 (1969).

The general presumption in favor of the constitutional validity of legislation is not applicable in those instances where the legislation is challenged on the ground that it restricts the preeminent freedoms secured by the First Amendment. *Erznoznick v. City of Jacksonville,* 422 U.S. 205, 215 (1976). San Diego Ordinance No. 10795 (New Series) represents such

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[1] Article I, section 2 of the California Constitution is the state equivalent of the First Amendment. The recognition by this Court last term that this provision grants broader rights of free expression than the United States Constitution, represents "a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution." *Prune Yard Shopping Center v. Robins,* 100 S. Ct. 2035, 2046 (1980) (Marshall, J., concurring). In this case, the California Supreme Court, without discussion of the broader state free speech rights involved, held that the Ordinance does not abridge freedom of speech under the state constitution. *Metromedia, Inc. v. City of San Diego,* 26 Cal. 3d 848, 871, 610 P.2d 407, 420 (1980). Because, as discussed further below, the Ordinance violates the First Amendment, it necessarily follows that the Ordinance also violates the broader state constitutional rights of free expression.

a restriction. By prohibiting the posting of written political, social, religious, community-related, and commercial communications on the streets of San Diego,[2] the Ordinance constitutes a "substantial and material limitation on the physical ability of the citizens ... to effectively communicate their sentiments to one another" and thus interferes with "the ability of both the communicator and his audience to engage in a silent dialogue on the issues of the day." *Oklahoma ex rel. Department of Transportation v. Pile,* 603 P.2d 337 (Okla. 1979), *petition for cert. filed,* 48 U.S.L.W. 3699 (U.S. Feb. 11, 1980) (No. 79-1617). Communication of information, dissemination of views and ideas, and advocacy of causes are activities protected under the First Amendment. *Village of Schaumberg v. Citizens for a Better Environment,* 100 S. Ct. 826, 833-34 (1980). State laws restricting the use of property are invalid if they infringe the freedom of expression protected by the First and Fourteenth Amendments. *Prune Yard Shopping Center v. Robins,* 100 S. Ct. at 2049 (1980) (Powell, J., concurring).

Of course, the Ordinance is not *ipso facto* invalid merely because it limits the ability to express one's self. This Court has recognized that in certain instances, this right may be curtailed. *E.g., Gertz v. Welch,* 418 U.S. 323 (1974) (defamation); *Roth v. United States,* 354 U.S. 476 (1957) (obscenity); *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942) (fighting words);

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[2] The California Supreme Court's discussion of the First Amendment issue in this case presupposes that the city's ban affects only commercial speech. It is well settled that commercial speech is entitled to First Amendment protection. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 100 S. Ct. 2343, 2349 (1980). As Mr. Justice Brennan stated in his concurrence in that case, "[n]o differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information." *Id.* at 2354. However, it must be noted here that the Ordinance bans more than just commercial speech, which has been defined as business advertising that does no more than solicit a commercial transaction or state information relevant thereto. Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment,* 65 Va. L. Rev. 1, 1 (1979). Billboards carrying political, social, religious, and community service messages serve the same functions as newspapers and cannot be classified as commercial speech. *See* Juris. Statement, App. I.

Schenck v. United States, 249 U.S. 47 (1919) ("clear and present danger"). However, the governmental body seeking to prohibit the expressive activity must demonstrate that the regulation is constitutionally permissible. *Consolidated Edison*, 100 S. Ct. at 2322. This is a burden that the City of San Diego cannot meet.

The San Diego Ordinance bans the use of billboards for the display of many types of messages in the city. Such signs are both "a means of communication and a media for the expression of ideas," Joint Stipulation of Facts, Juris. Statement at 122a; and are used to advertise political, social, religious, community affairs, and commercial messages. *Id.* at 124a-126a. Exhibit A of the brief amicus curiae of Pacific Legal Foundation before the California Supreme Court, substantially reprinted in the Jurisdictional Statement at Appendix I, illustrates the types of uses to which billboards are put in San Diego.

The Ordinance *does* permit certain other messages to be displayed on signs in the city. These exceptions highlight the fact that the Ordinance impermissibly attempts to regulate speech on the basis of content. The Ordinance does not prohibit on-site signs. Nor does the Ordinance apply to billboards which designate premises for sale, lease, or rent; billboards depicting time, temperature, or news; temporary billboards related to political campaigns; religious symbols; or commemorative plaques of historical societies. Clearly, then, the Ordinance is aimed at the content of the message, by proscribing certain subject matter from billboards, while permitting other messages to be displayed. The Ordinance does not attempt to regulate the time, place, or manner of all messages sought to be conveyed, but instead expressly distinguishes between permissible and impermissible messages on the basis of their substantive content. Such content-based regulation is unconstitutional. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

The proper test to determine the validity of a regulation which restricts the time, place, or manner of protected speech, rather than the content of the speech, is to balance the

competing interests involved by weighing the extent to which the communicative activity is inhibited versus the interest served by enforcing the inhibition. *See Grayned v. City of Rockford,* 408 U.S. 104, 115 (1972). On the other hand, as in this case, when the regulation abridges protected speech on the basis of *content,* such regulations *must* be struck down under the First Amendment; no balancing of governmental interest is permissible since no valid reason may be given for content-based abridgement of speech:

> "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations omitted.] To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, *supra,* 376 U.S., at 270, 84 S.Ct., at 721." *Mosley,* 408 U.S. at 95-96.

Accord, Hudgens v. National Labor Relations Board, 424 U.S. 507, 520-21 (1976). *See also Cohen v. California,* 403 U.S. at 19.

Because the San Diego Ordinance impermissibly bans certain messages while allowing others, it conflicts with the well-established laws of our nation enjoining content-based prohibitions on the free exercise of speech. As such, the law is constitutionally infirm.

B. The Undue Burden on Free Speech Is Not Related to the Goals of the Ordinance

Even if this Court views the Ordinance as a regulation of time, place, or manner, which adversely affects free speech,

rather than one aimed at the content of the protected expression, the Ordinance suffers the same constitutional infirmity. Such a restriction on free speech must be evaluated to determine whether it "is exerted so as not to *deny or unwarrantedly abridge* ... opportunities for the communication of thought." *Cox v. New Hampshire,* 312 U.S. 569, 574 (1941) (emphasis added). *See Village of Schaumberg,* 100 S. Ct. at 834. To achieve this, a "balancing test" has traditionally been employed. The factors to be balanced are, on the one hand, "the extent to which communicative activity is in fact inhibited; and on the other hand, the values, interests or rights served by enforcing the inhibition." L. TRIBE, *supra* at § 12-20. The restriction must be no greater than necessary to achieve the stated governmental interest. *United States v. O'Brien,* 391 U.S. 367, 377 (1968). *See* Bogen, *Balancing Freedom of Speech,* 38 Md. L. Rev. 387 (1979).

Two variables are examined in the weighing process. The first is the degree to which the regulation falls unevenly upon various groups in society. The second is the degree to which the regulation shuts down otherwise traditional public forums. L. TRIBE, *supra.* Such time, place, and manner restrictions cannot be applied, however, to prohibit the use of a legitimate forum, *Hague v. CIO,* 307 U.S. 496, 516 (1939), or to force the speaker to move from one appropriate place to another. *Spence v. Washington,* 418 U.S. 405, 411n.4 (1974). *See Schneider v. New Jersey,* 308 U.S. 147 (1939). In this case, the prohibition on free expression imposed by the Ordinance must be balanced against the stated goals of promoting aesthetics and vehicle safety. *See Oklahoma ex rel. Department of Transportation v. Pile, supra.*

The first factor to be examined in the "balancing test" is the extent to which the Ordinance inhibits communicative activity. The Ordinance prohibits the use of a recognized public forum for the exercise of First Amendment rights. *Schneider, supra; Hague, supra.* By forbidding certain messages to be conveyed on billboards, the Ordinance disproportionately impacts those who cannot afford to utilize the more expensive media of radio, television, and newspapers, and thereby denies

equal opportunities for the communication of thought. Billboards are the least expensive of the mass media, Juris. Statement at 18n, and in many instances are the only available public medium for those who wish to widely disseminate their message, but who lack the wherewithal to gain access to the press or the airwaves.

Because the message is conveyed free to the public, billboards have a greater potential for reaching a greater number of people in a given area than the press. The cost to the consumer of obtaining information through the print media serves to narrow the receiving audience. For many people, access to the public through radio or television is economically prohibitive. Unlike the costs of commercial speech, which are likely to be passed on to the consumer of the good or the product, "increasing the costs of communication for noncommercial speech may totally silence it." *Bogen,* 38 Md. L. Rev. at 412. *See Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85, 93 (1977); *Martin v. Struthers,* 319 U.S. 141, 146 (1943). "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley v. Valeo,* 424 U.S. at 49. The availability of alternate public forums is an impermissible criterion in this analysis. *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974).

Billboards are also a valued forum for the exercise of free expression because, in many instances, they are the most suitable alternative for conveying the desired message. In short, they are a unique medium of communication for which no adequate substitute exists. *See Linmark Associates,* 431 U.S. at 93. Billboards permit visual impact not substantially reproducible in any other medium. This is a vital feature with respect to communication for which the visual image is an integral part. Billboards permit the projection of a "larger than life" image unequaled by any other medium. The impact of a billboard message protesting higher taxes or government regulation or warning of the need for energy conservation is unparalleled by any other means. *See* Juris. Statement, App. I.

Additionally, there are some messages which can be communicated effectively *only* through billboards; for example, the fast food restaurant, motel, or gas station which wishes to indicate its location ("two blocks east of the next freeway exit") to the out-of-town or highway traveler. Finally, the use of billboards allows messages to be directed to only a narrow segment of the general community, for example, by appealing to certain ethnic groups, or by advertising neighborhood community or social programs. Billboards are a much more effective medium for restricting the message to its area of greatest effectiveness than the other standard media which cannot readily be limited to a particular area or neighborhood.

The Ordinance also has a negative impact on commercial competition. The cost impact will fall disproportionately upon smaller, less established businesses. New companies are less likely to be able to afford alternative advertising media than established ones. This is compounded by the fact that the need for product recognition is more pressing for the newcomer attempting to compete with older, more established products which the public recognizes with ease. The inability to restrict advertising to a particular market also works to the special disadvantage of the smaller, local, and/or new competitor with a restricted advertising budget. National or even statewide advertisement in magazines or on television is not only expensive, but is wasteful for a product with only local appeal. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

The Ordinance not only has a detrimental effect on advertisers, but also infringes on the right of the consuming public to receive the information which billboards provide, whether it be political, social, or commercial. This right to receive information is independently protected by the First Amendment. The "right to receive information and ideas, regardless of their social worth ... is fundamental to our free society." *Stanley*, 394 U.S. at 564 (citations omitted).

The competing factor to be weighed in the "balancing test" is the extent to which the values, interests, or rights of the city are served by enforcing the prohibition. The above interests

served by the use of billboards for the free exercise of First Amendment rights must be balanced against the furtherance of the city's substantial governmental interest. *United States v. O'Brien,* 391 U.S. at 377. The stated goals of the Ordinance are to eliminate traffic hazards caused by distracting signs, and to preserve and improve the appearance of the city.[3] However, when, as here, "it is shown that a governmental action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Bates v. City of Little Rock,* 361 U.S. 516, 525 (1960). This Court must also determine whether the action sweeps unnecessarily broad, thereby invading an area of protected freedoms. *Griswold v. Connecticut,* 381 U.S. at 485.

The Ordinance was enacted to eliminate traffic hazards caused by signs. The California Supreme Court held, without any specific findings, that such a reasonable relation exists, because billboards divert the attention of drivers from the roadway. *Metromedia,* 610 P.2d at 412. In fact, the record in this case shows that the opposite is true. Juris. Statement at 25-26. The court was also forced to reverse its own previous holding to reach the conclusion that aesthetics alone are sufficient to ban billboards. *Id.* at 413. However, the Ordinance does not limit itself to only those signs which impede a clear view of the roadway, or those signs within a certain distance of the roadway. Nor does the Ordinance include within its prohibition on-site signs; religious and historical society emblems; sale, lease, or rent signs; signs on trucks, buses, and taxicabs; temporary political campaign signs; or signs depicting time, temperature, or news, which, in most instances, depend on the use of flashing lights to convey their messages. These signs can be of equal or greater distraction than, and have the same potential for aesthetic violation as, those signs prohibited by the Ordinance, yet they are not included.

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[3] The Ordinance also states as its goals the elimination of excessive confusion caused by sign displays, and the assurance that signs are used only for identification and not for advertisement.

In the pursuit of its legitimate interests, the city must employ "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Village of Schaumberg,* 100 S. Ct. at 836. *See Griswold v. Connecticut,* 381 U.S. at 485. If there is no nexus between the means used to regulate the activity and the legitimate ends of the regulation, the court may disregard the ends as justification for the challenged law. *E.g., Street v. New York,* 394 U.S. 576 (1969).

In this case, even if this Court views the Ordinance as not banning the content of the message, but rather an attempt to control the time, place, or manner of billboard use, the Ordinance must be found to be void because it sweeps unnecessarily broad, and bears no rational relation to the legal fictions put forth as the goals which it purportedly seeks to achieve. *Village of Schaumberg,* 100 S. Ct. at 836-37. For this reason, the Ordinance unconstitutionally violates the guarantee of free speech.

II

THE SAN DIEGO ORDINANCE VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS

The Fourteenth Amendment to the United States Constitution guarantees that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." It has been said that to deny the use of a traditional public forum such as the streets for the dissemination of certain information, "while allowing other groups to use the streets to voice opinions on other subjects . . . amounts . . . to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Cox v. Louisiana,* 379 U.S. 536, 581 (1965) (Black, J., concurring). *See Mosley,* 408 U.S. at 96-98.

The Ordinance violates the Fourteenth Amendment guarantee of equal protection because it impermissibly accords preferential treatment to the dissemination of certain messages

on billboards in the city while totally prohibiting other messages from being so conveyed. "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown*, 100 S. Ct. 2286, 2290 (1980). In *Carey*, this Court found that the labor picketing ordinance in question, enacted under the guise of preserving residential privacy, actually discriminated on the basis of content by flatly prohibiting all nonlabor picketing while permitting labor picketing that is equally likely to intrude on the tranquility of the home. *Carey*, 100 S. Ct. at 2291. Adopting the language of *Mosley*, this Court held that

> " 'under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.' " *Carey*, 100 S. Ct. at 2291, *quoting Mosley*, 408 U.S. at 95-96.

Because the restriction was content-based, this Court held that "even the most legitimate goal may not be advanced in a constitutionally impermissible manner." *Carey*, 100 S. Ct. at 2292. Rejecting the argument that protest over some issues "is more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects about which these appellees wish

to demonstrate," this Court found the statute to contravene the Equal Protection Clause. *Id.* at 2293.

The logic of *Carey* is directly applicable to this case. The Ordinance, as a content-based restriction, cannot be legitimized by the invocation of the allegedly laudable goals to be served. Even if such an analysis *were* permitted, there is nothing in the content-based restriction which would promote those goals. The ends of traffic safety and aesthetics are not served by a regulation which prohibits certain economic, political, and social messages on signs while allowing others to be displayed. Nor does the restriction attempt to tailor the means to achieve the ends in a less intrusive manner. The Ordinance does not attempt to control on the basis of size, shape, or location of billboards in order to promote aesthetics or traffic safety. Instead, the Ordinance discriminates on the basis of content.

The reasoning of *Carey* and *Mosley* are applicable to this case. For this reason, the Ordinance unconstitutionally violates the Equal Protection Clause.

III

THE SAN DIEGO ORDINANCE VIOLATES THE CONSTITUTIONAL GUARANTEE OF DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS

The Fifth Amendment to the United States Constitution forbids federal actions which amount to a deprivation of life, liberty, or property, without due process of law, and has been made applicable to the states by the Fourteenth Amendment. *Chicago, Burlington & Quincy Railroad Co. v. Chicago,* 166 U.S. 226 (1897). The purpose of these procedural safeguards is to insure personal freedom by preventing arbitrary government action, even in areas of legitimate government concern. L. TRIBE, *supra* at § 10-7. Various types of legislation have been held to violate due process where they have been deemed to constitute an inappropriate response to a perceived evil, resulting in an arbitrary deprivation of liberty or property of individuals. *See, e.g., Stanley v. Illinois,* 405 U.S. 645 (1972).

Governmental restrictions on the use of private property have traditionally occurred in either one of two generally recognized ways. The government may either take private property for a public purpose through the power of eminent domain, or it may regulate the use of private property through the police power. If eminent domain is used to take private property, compensation must be paid. Normally, no compensation is required when property is regulated under the police power.[4] However, the regulation must bear a rational relation to the health, safety, welfare, or morals of the community, and must not be arbitrary or discriminatory. An exercise of the police power which does not meet these requirements constitutes a denial of the constitutional right of due process. *Nebbia v. New York,* 291 U.S. 502, 537 (1934). *See Fred F. French Investment Co. v. City of New York,* 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *appeal dismissed,* 429 U.S. 990 (1976). "A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions." *Panhandle Eastern Pipe Line Co. v. State Highway Commission,* 294 U.S. 613, 619 (1935).

The Ordinance was purportedly enacted to promote aesthetics and traffic safety. These are proper factors for consideration in the exercise of the police power. Moreover, it is clear that governmental restrictions on the use of commercial property are proper. *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96, 107 (1978). However, as with any exercise of the police power, it is well settled that the means employed must be reasonably related to the ends sought to be achieved, and must not sweep more broadly than is necessary to achieve the desired ends. 1 N. WILLIAMS, AMERICAN PLANNING LAW—LAW USE AND THE POLICE POWER, § 7.04 (1975).

There can be no question that the purpose of the Ordinance is to ban all billboards from the City of San Diego. It is clear that the effect of the Ordinance on the appellants, by

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[4] Compensation is of course required when an exercise of the police power, even if valid, "goes too far" and becomes a taking. *Kaiser-Aetna v. United States,* 100 S. Ct. 383 (1979); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).

precluding them from conducting business in the city, constitutes a deprivation of property. The question arises whether this deprivation falls within the bounds of constitutionality.

The inquiry thus focuses on whether the Ordinance relates in a reasonable way to the health, safety, welfare, or morals of the community. *Bates v. City of Little Rock,* 361 U.S. at 525. As discussed further in Section I B. of this brief, the Ordinance, which bans the free exercise of speech, is not reasonably related to aesthetics or traffic safety. Specifically, the Ordinance cannot be said to be a regulation of potentially distracting or aesthetically unpleasing signs, because it does not include within its draconian dictates all such signs. It contains certain exemptions, and even permits the display of time, temperature, and news on signs, which, in most instances, utilize flashing lights to convey their message. It is difficult to imagine any sign which would be more distracting. Moreover, the Ordinance is not limited in scope to only those signs which impede a clear view of the roadway, or which are located a certain distance from the roadway, but includes *all* signs, regardless of location.

During the autumn months, many people enjoy driving through the countryside to observe the fall foliage. Under the logic of the Ordinance, the owner of a forest located adjacent to a road would be required to clear-cut his land in order not to distract motorists. Such an interpretation is, of course, absurd. So too is the justification put forth by the City of San Diego for banning billboards. The Ordinance bears no rational relation to its stated goals, and constitutes an arbitrary and discriminatory use of the police power. As such, the Ordinance violates the constitutional guarantee of due process.

CONCLUSION

It is the position of Pacific Legal Foundation that the San Diego Ordinance violates the constitutional guarantees of free speech, equal protection, and due process. For these reasons, the decision of the California Supreme Court in this case should be reversed.

Respectfully submitted,

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